

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Milton I. Shadur	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 3668	DATE	9/20/2002
CASE TITLE	Oliver Holt, etc. vs. Q.C. Construction, Inc., et al		

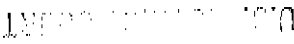
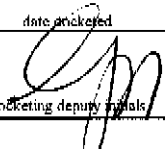
[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

--

DOCKET ENTRY:

(1)	<input type="checkbox"/>	Filed motion of [use listing in "Motion" box above.]
(2)	<input type="checkbox"/>	Brief in support of motion due _____.
(3)	<input type="checkbox"/>	Answer brief to motion due _____. Reply to answer brief due _____.
(4)	<input type="checkbox"/>	Ruling/Hearing on _____ set for _____ at _____.
(5)	<input type="checkbox"/>	Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(6)	<input type="checkbox"/>	Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(7)	<input type="checkbox"/>	Trial[set for/re-set for] on _____ at _____.
(8)	<input type="checkbox"/>	[Bench/Jury trial] [Hearing] held/continued to _____ at _____.
(9)	<input type="checkbox"/>	This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to] <input type="checkbox"/> FRCP4(m) <input type="checkbox"/> Local Rule 41.1 <input type="checkbox"/> FRCP41(a)(1) <input type="checkbox"/> FRCP41(a)(2).
(10)	<input checked="" type="checkbox"/>	[Other docket entry] Enter Memorandum Order. Accordingly the motion to dismiss is denied, and defendants are ordered to answer (not otherwise plead to) the Amended Complaint on or before September 30, 2002. In the meantime the previously-scheduled status hearing at 9 a.m. September 25 will remain in effect, and the parties' counsel are expected to appear at that time. (4-1)
(11)	<input checked="" type="checkbox"/>	[For further detail see order attached to the original minute order.]

<input type="checkbox"/>	No notices required, advised in open court.		number of notices		Document Number
<input type="checkbox"/>	No notices required.		SEP 23 2002		
<input checked="" type="checkbox"/>	Notices mailed by judge's staff.		date docketed		
<input type="checkbox"/>	Notified counsel by telephone.		docketing deputy initials		
<input type="checkbox"/>	Docketing to mail notices.		9/20/2002		
<input type="checkbox"/>	Mail AO 450 form.		date mailed notice		
<input type="checkbox"/>	Copy to judge/magistrate judge.		SN		
SN	courtroom deputy's initials	Date/time received in central Clerk's Office	mailing deputy initials		

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOCKETED

SEP 23 2002

OLIVER HOLT, etc.,)	
)	
Plaintiff,)	
)	
v.)	No. 02 C 3668
)	
Q.C. CONSTRUCTION, INC., et al.,)	
)	
Defendants.)	

MEMORANDUM ORDER

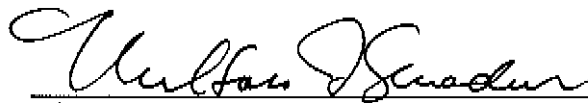
Instead of filing an answer to the Fair Labor Standards Act ("Act") Complaint in this case, counsel for the three defendants filed what is characterized as a Fed. R. Civ. P. ("Rule") 12 motion "to dismiss the complaint for failure to state a cause of action." In those terms the motion is plainly improper, because it goes beyond the Complaint to assert factual matters in the form of an affidavit from co-defendant Phillip Livingston. That factual submission could entitle this Court to convert the motion into a Rule 56 motion for summary judgment (see the last sentence of Rule 12(b)), but such treatment is appropriate only if the exercise of sound discretion appears to call for such conversion.

As the response that has now been filed by plaintiff's counsel demonstrates, that is simply not true here. There are genuine issues of material fact as to whether defendants violated the Act, and any attempt at such a threshold resolution of those factual issues would not at all serve the interests of justice. Moreover, plaintiff's counsel has joined the response to the

7

motion with the tender of an Amended Complaint--something that he has an absolute right to file under Rule 15(a).

Accordingly the motion to dismiss is denied, and defendants are ordered to answer (not otherwise plead to) the Amended Complaint on or before September 30, 2002. In the meantime the previously-scheduled status hearing at 9 a.m. September 25 will remain in effect, and the parties' counsel are expected to appear at that time.

A handwritten signature in cursive script, appearing to read "Milton I. Shadur", is written over a horizontal line.

Milton I. Shadur
Senior United States District Judge

Date: September 20, 2002